IN THE SUPREME COURT OF MISSOURI
EN BANC

ROBERT KAPLAN, et al.,	)	
	)	
Plaintiffs/Respondents	)	
	)	
vs.,	)	No. 85341
	)	
U.S. BANK, N.A., et al.,	)	
	)	
Defendants/Appellants	)	

Appeal from the Circuit Court
Of St. Charles County

The Honorable Ronald McKenzie
Senior Circuit Judge

Substitute Brief of Appellant U.S. Bank, N.A.

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Jurisdictional Statement

This is a civil action for money damages arising from the disposition of waste concrete on plaintiffs' property. The concrete had trace amounts of polychlorinated biphenyls (PCBs), in amounts so small that both state and federal environmental authorities treated it as clean fill.

The party physically responsible for disposing of the concrete was Southern Contractors, which placed it in a creek bed at the request of some adjoining property owners who wanted to control erosion. Plaintiffs claimed that Southern was acting as an agent of U.S. Bank in so disposing of the concrete. Plaintiffs also alleged that the Bank had negligently violated a work plan, to which plaintiffs were not a party, in failing to dispose of the concrete in a landfill.

The jury awarded actual and punitive damages against the Bank. After the court of appeals issued an opinion, this Court granted the Bank's application for transfer pursuant to Rule 83.04, and now reviews the case as though on original appeal. Buchwesier v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. banc 1985).

Statement of Facts

1. The Parties.

Plaintiffs are Robert Kaplan, as trustee of the Robert Kaplan Trust, and Leonard O'Brien, d/b/a/ Cloverleaf Properties. L.F. 67; 122 ¶¶ 3-4. At the times relevant to this lawsuit, they owned a 22-acre tract of land in St. Charles County. L.F. 67; 122 ¶ 5. They had purchased that land in 1981 and operated it as a trailer park. Tr. 2018. Today, it is the site of a Lowe's Home Improvement Store. Id.

Gusdorf Corporation was a Missouri corporation prior to its dissolution in 1997. L.F. 67; 123 ¶ 6. Gusdorf owned a tract of land on Lackland Road in St. Louis County. L.F. 66-67; 122 ¶ 1. On that land was a manufacturing facility that Gusdorf used to manufacture furniture. Tr. 336.

U.S. Bank, f/k/a/ Firstar Bank, f/k/a/ Mercantile Bank (the Bank) is a national banking association. L.F. 67; 123 ¶ 6; Tr. 1139. The Bank was Gusdorf's principal lender, Tr. 336, and it held a security interest in all of Gusdorf's assets, including the Lackland Road property. Tr. 970. In December 1992, the Bank ceased funding further advances to Gusdorf and called its loan, and the plant closed in March 1993. Tr. 971.

Avanti Marketing Group d/b/a/ Southern Contractors (Southern) is a Missouri corporation. L.F. 68; 123 ¶ 8. Southern is a family owned business, Tr. 1679, whose principal is Gerald Winter. Tr. 1602. The Bank initially retained Southern to assist in negotiations over the Lackland Road site. Tr. 1602. The Bank subsequently retained Southern to demolish the facilities on that site. Tr. 1218.

2. The Lackland Road Site.

Prior to Gusdorf's occupation of the site, a company called Wagner Electric had used the facility to manufacture electrical transformers. Tr. 365; 605. Wagner used polychlorinated biphenyls (PCBs) as an insulator for the transformers. Tr. 366-67. PCBs were ideal for that application since they were not only "an excellent electrical insulating product," but also "very resistant to fire and temperature changes." Tr. 2435. A PCB transformer was much safer than a mineral oil transformer, because the latter was "very flammable" and hence "real hazardous" to residents of buildings in which it was installed. Id. As a result, PCBs became the "electrical insulating fluid of choice." Id.

As it turned out, PCBs' great advantage – their stability – also proved to be their undoing. In the mid-'60s to mid-'70's, scientists discovered that PCBs broke down in the environment very slowly. Tr. 2438. Thus, they tended to persist in the environment and "small levels were being found everywhere." Id.

Fortunately, trace levels of PCBs pose no hazard to health or the environment. Tr. 2443. The U.S. Environmental Protection Agency (EPA) standard for concrete is less than 10 parts per million (ppm). Tr. 2448-49. Both EPA and the Missouri Department of Natural Resources (DNR) regard concrete with less than 10 ppm PCB as clean fill. Tr. 2510-22; 2528.

Unfortunately, the Lackland Road site had substantially greater levels of PCB contamination. Out of 101 test samples, 94 showed some degree of contamination. Tr. 840. Some soil tested at 70 ppm; soil in the vicinity of the railroad track tested at over 9,900 ppm. Tr. 837; 839. Steven Sweet, an environmental consultant retained by the

Bank, described the site as badly contaminated. Tr. 448. For that reason, the Bank decided not to foreclose until the site had been remediated. Tr. 973.

3. The Settlement Agreement And The Work Plan

After selling the Lackland Road site to Gusdorf in 1976, Wagner became a subsidiary of Cooper Industries. P.Ex. 78 at 1. Gusdorf and the Bank therefore negotiated with both Cooper and Wagner about site cleanup. The Bank's representative in these negotiations was Karen Myers, P.Ex. 69 at 8, who was in charge of the project for the Bank. Tr. 799. George von Stamwitz represented Gusdorf. Tr. 1194.

As of the date of these negotiations, Gusdorf was a legally registered corporation, Tr. 1195, and it continued to own the Lackland Road site. Tr. 996. Gusdorf was insolvent and dependent on the Bank's operational and financial support. Tr. 1038. In opening statement, counsel for the Bank acknowledged that Gusdorf was by then a shell company. Tr. 272.

In November 1994, Gusdorf, Wagner and Cooper reached a formal written agreement to remediate the Lackland Road site. P.Ex. 69. The agreement designated the Bank as a beneficiary of the agreement, and Ms. Myers executed the agreement for the Bank. Id. at 1; 8.

The settlement agreement required Cooper, at its sole expense, to remove all material contaminated with more than ten ppm of PCBs. Tr. 1040. Cooper would pay 75% of the cost of demolishing the buildings and the Bank would pay the balance. Tr.

1041. If the Bank wanted the property below 10 ppm, it was free to remediate at its own expense. Id.

The agreement required Cooper to draft a proposed Work Plan to carry out the cleanup. P.Ex. 69 at 6. It also required Cooper to make its best efforts to secure the approval of the EPA for the Work Plan. Id. at 1. Such work plans are common in remediation cases, because they describe a method for completing the cleanup and obtaining regulatory approval. Tr. 559. While they are binding between the regulator and the applicant, the environmental engineer who prepared the Cooper Work Plan testified that they are not binding between the parties to such work plans. Tr. 548; Tr. 560.

The Cooper Work Plan classified PCB-contaminated material as "PCB-containing wastes" and "special wastes." P.Ex. 78 at 13. PCB-containing wastes were those materials in which the concentration was 40 ppm or more; the Work Plan contemplated disposal of those wastes at a permitted toxic waste landfill. Id. at 14. Special wastes were less than 40 ppm; the Work Plan contemplated disposal of those wastes at a permitted landfill. Id. The classification portion of this particular Work Plan contemplated that wastes between 1 and 10 ppm would be disposed of at a permitted landfill if removed from the Lackland Road site. Tr. 554.

The engineer who drafted the Work Plan testified that it also contemplated reuse of material with only trace amounts of PCB contamination. Recyclable or reusable material, if accepted by a willing purchaser, would not be treated as special waste requiring disposal in a landfill. Tr. 581. The Work Plan described an elaborate system

for testing the concrete walls to determine whether the PCB levels were low enough to permit reuse. P.Ex. 78 at 24; Tr. 583. Thus it "[a]bsolutely" contemplated that concrete with trace PCB contamination could be reused. Tr. 583.

The engineer also testified that parties can modify work plans if conditions change; in those circumstances "it behooves the persons who are responsible for implementing the work plan to make appropriate changes." Tr. 560. With the approval of the relevant regulatory agency, the parties may also deviate from the terms of the original work plan, so long as its objectives are being achieved. Id.

EPA approved the Cooper Work plan as it appeared to "adequately address" the issues. Tr. 1054; P.Ex. 94. In July 1996, EPA gave written approval of the cleanup as being in compliance with the Work Plan. Tr. 1307-08. The Bank foreclosed the following September. Tr. 1309.

4. The Southern/Gusdorf Contract.

Once the basic PCB cleanup was over, it was necessary to engage a non-PCB demolition contractor to demolish the building. Ms. Myers on behalf of the Bank decided to select Southern, Tr. 728, because Mr. Winter knew the building better than anyone and the Bank wanted to avoid cost overruns. Tr. 1218-19.

In January 1996, Gusdorf, which still owned the Lackland Road site, and Southern entered into a formal contract for the demolition. P.Ex. 137. In accordance with the settlement agreement, Cooper and the Bank funded this arrangement. P.Ex. 69 at 4.

Paragraph 7 of the Gusdorf/Southern contract contains a lengthy list of the contractor's rights and responsibilities. Subparagraph A provides:

> Contractor shall supervise and direct the work, using his best skill and attention and shall be solely responsible for all means, methods, techniques, sequences and procedures used to complete the work.

P.Ex. 137 at 4.

The contract requires Southern to have a minimum of $2,000,000 in liability insurance. P.Ex. 137 Appx F. It requires Southern to "provide and pay for all labor, materials, equipment and facilities necessary for the completion of the work." Id. at 4. It requires Southern to "secure and pay for" all permits, licenses and inspections necessary for the work. It requires Southern to indemnify Gusdorf from any claims arising out of the performance of the work. Id. It finally provides:

> All materials resulting from the demolition portion of the above work that is not approved by Owner for use as onsite fill shall be removed from the site and properly disposed of by Southern as part of the work under this contract.

Id. Appx B at 2.

Ms. Myers testified on several occasions that the Bank had the right to tell Southern "exactly where to take" any waste removed from the site – i.e., the right to direct Southern to dispose of it at a landfill. Tr. 1390-93. Mr. Winter gave conflicting testimony on the topic. On direct, he testified that the Bank had the authority to direct him to dispose of waste material at a landfill. Tr. 1613-14. On cross, he testified that the disposal site was within his discretion and it was common to leave that decision to the

contractor. Tr. 1694-95. Neither witness testified that the Bank had the right to control the physical conduct of Southern's employees or sub-contractors in carrying out the work, and no other witness so testified.

Although the EPA-approved Work Plan allowed material with less than ten ppm PCB contamination to remain on site, the Bank's soil consultant recommended that it should be removed. Tr. 1055-56. Ms. Myers accepted that recommendation and decided to remove all PCB contaminated materials, together with any clean material not required for backfill. Tr. 1043; P.Ex. 171.

To that end, on June 12, 1996, Gusdorf and Southern executed Change Order No. 5 to their contract. P.Ex. 171. That change order required Southern to crush, load and dispose of all construction debris left on the site. It required Southern to dispose of all PCB-contaminated material at one of two specified landfills. It required Southern to remove all clean fill from the premises and to notify Gusdorf of its destination in advance of shipment. P.Ex. 171. The change order did not modify any of the other provisions of the basic contract.

5. The Disposal On Faye Avenue.

The houses on the south side of Faye Avenue abut plaintiffs' property, separated in 1996 by a large ditch. Tr. 1451-52. Water flowing out of a culvert caused extensive erosion to the back yards of the Faye Avenue homes. Tr. 1453-54. In 1995, one of the homeowners put some waste concrete into the ditch to stop the erosion. Tr. 1456. Another homeowner, Leonard Werre, called the City of St. Charles Public Works

Department to find out if he could do the same. Tr. 1456-57. The City advised that he could if the concrete were clean. Tr. 1457.

Mr. Werre worked near the Lackland Road site and he drove past it on a daily basis. Tr. 1457. One day he stopped to inquire about the availability of some of the concrete for fill in the ditch. Tr. 1458. Mr. Winter told him that the concrete was clean and that he was looking for a site to dispose of it. Id. After verifying with the City that no permit was necessary, Tr. 1725-26, Mr. Winter agreed to deposit the concrete in the ditch behind Mr. Werre's house. Tr. 1461; 1724. Two neighbors asked for a similar favor. Tr. 1464. None of the homeowners paid anything for the fill. Tr. 1461; 1464.

In July 1996, Southern commenced dumping waste from the Lackland site in the ditch. Tr. 1462. Ultimately, Southern disposed of 295 truckloads of concrete in that ditch. Tr. 1647. Unfortunately, a substantial portion of the concrete ended up on the property of the plaintiffs, Tr. 2026, who had not given Southern permission to deposit it there. Tr. 2044.[1]

Subsequent testing also revealed trace amounts of PCB contamination on the concrete and surrounding soils. P.Ex. 227 at 7-8. The highest concentration was 4.14 ppm, and the rest were all less than one ppm. Id. As noted, both DNR and EPA regarded this as clean fill, Tr. 2510-12; 2528, and the trace amounts posed no threat to either health

[1] Southern dumped 99 loads of concrete on Mr. Winter's farm and 114 loads on the farm of one of his friends. Tr. 1722-24.

or the environment. Tr. 2443. Before trial, the parties stipulated that the concrete was not hazardous waste under either federal or state law. Tr. 161-62.

Marty Kasper, an environmental specialist for DNR, testified that the dumping violated the Missouri Clean Water law. Tr. 1978. He also made it clear that the "PCBs didn't make it a contaminate." Tr. 2010. Rather, it is illegal to put anything in a Missouri stream without a DNR permit. Tr. 2008:

> You put mud into a creek, dump a truck load of mud into a creek, you are contaminated because you're changing the makeup of the creek and therefore changing the fauna. So everything in there was a contaminate not just the PCBs. I wasn't distinguishing the PCBs.

Tr. 2010.

Mr. Winter testified that he did not inform Ms. Myers of Southern's intentions to dispose of the concrete in the Faye Avenue ditch, Tr. 1696, and there is no evidence to the contrary. The Gusdorf employee who kept the records testified that he did not advise Ms. Myers of Southern's plans during the summer of 1996, and he did not supply her the records until September. Tr. 775-76. There is no evidence that the Bank knew that any of the concrete ended up on plaintiffs' property until after plaintiffs discovered it at the end of 1996.

Mr. Winter testified that the site manager at Lackland Road took him around the site and identified the piles of concrete with PCB contamination and the piles that were clean. Tr. 1715. Based on that identification, he believed the material sent to Faye Avenue was clean. Tr. 1662. There is no evidence to the contrary. There is no evidence

that the Bank knew that the concrete was contaminated until after plaintiffs arranged to test it in the spring of 1997.

6. Defendants' Efforts To Rectify Matters.

On December 30, 1996, a hard rain backed up a storm sewer in the trailer park, blew out a manhole cover, and flooded several yards. Tr. 2024-25. In investigating the cause, plaintiffs discovered the concrete, some of which was blocking the culvert. Tr. 2026. They also discovered that the source of the concrete was the Gusdorf site, which greatly concerned Mr. Kaplan because he knew that site had been contaminated with PCBs. Tr. 2028-29.

Mr. Kaplan called a meeting to discuss the situation on January 8, 1997. Tr. 2037. Ms. Myers planned to attend that meeting but became sick that morning and advised plaintiffs she would not be able to come. Tr. 1128-29. Mr. Winter did attend. While he continued to believe that the fill was clean, he offered to pay for testing. Tr. 1140. On April 14, 1997, Mr. Winter signed a contract with ATC to provide that testing. Tr. 1667. Southern supplied equipment to build a road so that ATC had access to the site. Tr. 2055; 2201-02. Southern also supplied a backhoe and operators so that ATC could test the concrete. Tr. 1667.

Southern also offered at the January 8 meeting to remove the concrete at its expense and to restore the property to its original condition. Tr. 1699; 2189-90. Initially, Mr. Kaplan refused access to the property until testing could be completed. Tr. 1730; 2279. Thus, Southern agreed to do nothing until specifically authorized by Mr. Kaplan.

Tr. 2279. After ATC completed its tests in mid-May, Southern renewed its offer to remove the concrete. Tr. 1758-59; 2210. Mr. Kaplan did not authorize removal. Tr. 1775; 2285. Instead, in March 1997, he told his counsel to file a lawsuit. Tr. 2259. By mid-June, Mr. Kaplan had decided that he was going to take legal action. Tr. 2220-2221.

Plaintiffs made no formal demand on the Bank until after that time. On June 12, 1997, through Mr. Winters, the Bank asked for a letter setting forth plaintiffs' demands on the Bank. P.Ex. 232; Tr. 2220. On June 20, 1997, Mr. Kaplan asked the Bank to attend a meeting on June 26, 1997. P.Ex. 236. At that meeting, plaintiffs requested that the Bank remove the concrete, dispose of it properly, and perform sufficient tests on the site to satisfy DNR. They asked for a release from the property owners, a release and indemnity from Southern and the Bank, and their out-of-pocket expenses. Tr. 857-60. On July 3, 1997, their counsel reduced these demands to writing. P.Ex. 242.

By mid-July, the Bank had offered to remove all the concrete from the site and have ATC supervise the cleanup. Tr. 867; 2239. It did not agree to indemnify plaintiffs. Tr. 2239. Plaintiffs responded that the Bank had to accept all of their demands in full in order to resolve the matter. Tr. 2261.

In June 1999, plaintiffs entered into a lease, under which the trailer park would be replaced by a Lowe's Home Improvement Warehouse. Tr. 2140. As part of that lease, plaintiffs agreed to clean up the concrete. Tr. 2142. Plaintiffs notified the Bank. Southern and the Bank once again offered to remove the concrete at no expense to plaintiffs, and funded that offer with a $250,000 escrow deposit. Tr. 889; 2143; P.Ex.

286. Under the express terms of this offer, plaintiffs were free to accept it and continue to prosecute their lawsuit. P.Ex. 286.

Plaintiffs asked their environmental consultant for an unbiased assessment of this offer. Tr. 2145-46. Based on that assessment, they told Southern and the Bank that the offer was "unacceptable" for 21 separate reasons. P.Ex. 298 at 3-5. Three items in particular upset Mr. Kaplan:

- Absence of an indemnification provision.
- The assumption that only 3,500 tons would be removed, when the actual number was closer to 6,000 tons.
- The prohibition against plaintiffs interfering with the work.

Tr. 2145-46. The consultant had a number of other objections: lack of a work plan, lack of provisions for testing or sampling, lack of independent oversight, and an incentive to the proposed contractor to minimize expenses. Tr. 1921-22; 1930; 1944; 1946.

The contractor had responses to most of these concerns. If the estimate were short, he would negotiate a change order which would have added approximately $30,000 to the cost. Tr. 2396. He expected to prepare a work plan and sampling plan once the project was approved. Tr. 2394-95. He also expected that DNR would oversee the project, Tr. 2395, which would resolve most of plaintiffs' other concerns. The letter rejecting the cleanup proposal, however, makes no offer to reach any resolution of any of plaintiffs' alleged concerns.

7. <u>Proceedings Below.</u>

In November 1997, plaintiffs filed suit in federal court. That court dismissed the lawsuit because the PCBs were not hazardous wastes under federal law and hence there was no basis for federal jurisdiction. Tr. 130. At trial of the instant case, and to avoid evidence about the federal case, the parties stipulated that the concrete was not hazardous waste under either federal or state law. Tr. 131-32; 161-62.

In November 1998, plaintiffs filed the instant lawsuit. The original defendants included the three Faye Avenue property owners and Gusdorf, in addition to Southern, Mr. Winter and the Bank. L.F. 28-29 ¶¶ 6-12. Shortly before trial, plaintiffs settled with the homeowners and dismissed them from the lawsuit. L.F. 215; Supp. L.F. 25. Plaintiffs dismissed their claims against Gusdorf at the close of the evidence. L.F 168.

Plaintiffs submitted their case against Southern on trespass and various types of negligence associated with the disposition of the concrete. L.F. 180; 182. They submitted against Mr. Winter on negligence. L.F. 178. Plaintiffs also submitted that the Bank was liable for Southern's alleged misconduct on the basis of respondeat superior. L.F. 184; 186.

Plaintiffs submitted against the Bank on two theories: trespass, in that the Bank failed to remove the concrete that its alleged agent had deposited on plaintiffs' property, and negligence, in that the Bank failed to properly dispose of the concrete under the Work Plan. L.F. 188; 190.

Plaintiffs also submitted a claim for punitive damages against Southern based on trespass and on Southern's alleged failure to "properly dispose of the concrete." L.F. 194; 197. They submitted a claim for punitive damages against the Bank based on the

Bank's alleged trespass and alleged negligence. L.F. 194; 198. Finally, plaintiffs submitted a claim for punitive damages against the Bank based on the theory that the Bank was liable respondeat superior for the actions of Southern. L.F. 194.

The jury found for plaintiffs on their trespass and negligence claims against both Southern and the Bank, and found the Bank liable for Southern's actions on both trespass and negligence. L.F. 210-11. The jury found Southern 20% at fault and the Bank 80% at fault on the negligence claim, and assessed actual damages at $650,000. L.F. 210-11. The jury also awarded punitive damages of $225,000 against Southern and $7,000,000 against the Bank. L.F. 211.

The trial court entered judgment under Rule 74.01(a) on September 24, 2001, L.F. 220, and the Bank filed a timely post-trial motion on October 4, 2001. L.F. 227. The trial court entered an amended judgment dated October 18, 2001 and filed October 26, 2001, L.F. 236, and the Bank filed a renewed post-trial motion on October 29, 2001. L.F. 238.

The trial court denied that motion on January 10, 2002, L.F. 495, and the Bank filed a notice of appeal on January 14, 2002. L.F. 497. On May 18, 2003, the court of appeals issued an opinion affirming in part and reversing in part. The court of appeals held that plaintiffs did not have a submissible case of agency, because the Bank did not have the right to control Southern's physical conduct. The court of appeals rejected the Bank's argument that it owed no duty to plaintiffs to follow the work plan, even though plaintiffs were not parties to the work plan. The court of appeals found that the instant case involved "one of the well-recognized exceptions" to the general rule: when "the

alleged negligence involves harm to others." According to the court of appeals, a party has a duty of reasonable care when it "undertakes to do something that the defendant knew or should have foreseen would harm others or increase the risk of harm to others." Thus, "foreseeability is the only issue to be addressed."

The court of appeals also held that plaintiffs had a submissible case of punitive damages against the Bank. The court of appeals stated that the Bank knew or should have known that disposal outside a landfill "created a high degree of probability of injury – namely, harm to the value of property" where the disposal occurred. The court of appeals also held that the Bank "showed complete indifference to and conscious disregard for others' rights." It therefore affirmed the judgment for actual damages against the Bank and remanded the case for a new trial on punitive damages. Slip Op. at 26.

On July 1, 2003, this Court sustained the Bank's application for transfer.

Points Relied On

I. The Trial Court Erred In Entering Judgment Against The Bank On Plaintiffs' Agency And Trespass Theories, Because Plaintiffs Did Not Have A Submissible Case Of Agency In That The Contract Did Not Give The Bank The Right To Control The Physical Conduct Of Southern

Williamson v. Southwestern Bell Tel. Co., 265 S.W.2d 354 (Mo. 1954)

Trinity Lutheran Church v. Lipps, 68 S.W.3d 552 (Mo. App. 2001)

Hougland v. Pulitzer Publ. Co., 939 S.W.2d 31 (Mo. App. 1997)

Halmick v. SBC Corporate Services, Inc., 832 S.W.2d 925 (Mo. App. 1992)

II. The Trial Court Erred In Entering Judgment Against The Bank On Plaintiffs' Negligence Theory, Because Plaintiffs Did Not Have A Submissible Case Of Negligence In That The Bank Owed No Duty To Plaintiffs To Follow The Work Plan

Fleischer v. Hellmuth, Obata & Kassabaum, 870 S.W.2d 832 (Mo. App. 1993)

Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967)

Anderson v. Boone County Abstract Co., 418 S.W.2d 123 (Mo. 1967)

Slate v. Boone County Abstract Co., 432 S.W.2d 305 (Mo. 1968),

III. The Trial Court Erred In Entering Judgment Against The Bank On Plaintiffs' Claim For Punitive Damages, Because Plaintiffs Did Not Have A Submissible Punitive Damage Case, In That:

A. Plaintiffs Did Not Have A Submissible Case For Punitive Damages Based On Their Closing Argument Because, As A Matter Of Law, A Court Cannot Punish A Party For Exercising Its Constitutional Right To Take A Case To Trial

Alcorn v. Union Pac R.R. Co., 50 S.W.3d 226 (Mo. banc 2001)

B. Plaintiffs Did Not Have A Submissible Case For Punitive Damages Based On Trespass, In That There Is Substantial And Uncontradicted Evidence That Both Southern And The Bank Offered To Remove The Concrete From Plaintiffs' Property

Shady Valley Park & Pool v. Fred Weber, Inc., 913 S.W.2d 28(Mo. App. 1995)

White v. James, 848 S.W.2d 577 (Mo. App. 1993)

C. Plaintiffs Did Not Have A Submissible Case For Punitive Damages Based On Negligence, In That There Is No Evidence That Either Southern Or The Bank Knew That Their Conduct Created A High Probability Of Injury Or Of Complete Indifference To Or Conscious Disregard Of Plaintiffs' Rights

Lopez v. Three Rivers Elec. Coop., 26 S.W.3d 151 (Mo. banc 2000)

Alcorn v. Union Pac R.R. Co., 50 S.W.3d 226 (Mo. banc 2001)

D. It Violates Due Process To Award Punitive Damages In The Absence Of Any Of The Gore/Campbell Reprehensibility Factors.

BMW of N. Am. v. Gore, 517 U.S. 559 (1996);

State Farm Mut. Auto. Ins. Co. v. Campbell, ___ U.S. ___, 155 L.Ed.2d 585 (2003).

IV. The Trial Court Erred In Denying The Bank's Motion To Remit The Punitive Award, Because The $7 Million Punitive Judgment Violates The Bank's Right To Due Process, In That The Degree Of Reprehensibility Is Minimal And The Award Greatly Exceeds Civil Or Criminal Penalties For Such Conduct

BMW of N. Am. v. Gore, 517 U.S. 559 (1996);

State Farm Mut. Auto. Ins. Co. v. Campbell, ___ U.S. ___, 155 L.Ed.2d 585 (2003).

Argument

I. The Trial Court Erred In Entering Judgment Against The Bank On Plaintiffs' Agency And Trespass Theories, Because Plaintiffs Did Not Have A Submissible Case Of Agency In That The Contract Did Not Give The Bank The Right To Control The Physical Conduct Of Southern.

The jury found that the Bank was liable for Southern's trespass and negligence. L.F. 210-11. The jury also found that the Bank was liable for trespass because it did not remove concrete placed on plaintiffs' property by Southern. L.F. 188; 210. The premise of all of these theories is that the Bank had the right to control the physical conduct of Southern, thereby making Southern the Bank's agent. The premise is false. The contract provides that Southern "shall be solely responsible" for completing the work. P.Ex. 171 at 4. That unambiguous contract requires the Court to reject plaintiffs' claim of agency.

Whether plaintiffs made a submissible case is a question of law, reviewed de novo by this Court. Mogley v. Fleming, 11 S.W.3d 740, 747 (Mo. App. 1999). In general, the Court views the evidence in the light most favorable to plaintiffs and gives them the benefit of all reasonable inferences. Id. When the case turns on the meaning of an unambiguous contract, however, "the intent of the parties is determined from the four corners of the contract." Eisenberg v. Redd, 38 S.W.3d 409, 411 (Mo. banc 2001). That rule applies to the determination of agency as much as to any other contract:

> Because interpretation of contract provisions is a matter of law for the trial court to decide, not a factual issue for resolution by the jury, this issue was purely a matter of law for the trial court to decide by

> interpreting the two documents. Therefore, the status of the relationship between Carron and Pulitzer was not an issue for the jury to decide.

Hougland v. Pulitzer Publ. Co., 939 S.W.2d 31, 33 (Mo. App. 1997) (affirming jnov for the alleged master).

Nothing in the contract gave Gusdorf or the Bank the right to control the physical conduct of Southern, either in general or with respect to disposition of the concrete. On the contrary, the contract provides that Southern "shall supervise and direct the work," and "shall be **solely responsible** for all means, methods, techniques, sequences and procedures used to complete the work." P.Ex. 137 at 4 (emphasis added). The contract required Southern to procure liability insurance of not less than $2,000,000. Id. Appx F. It further provides that:

- Southern "shall provide and pay for all labor, materials, equipment and facilities necessary to complete the work."
- Southern "shall obtain all permits, licenses and certificates of inspection necessary for the completion of the work."
- Southern shall "defend, indemnify and hold Gusdorf harmless" from all claims "arising out of or in connection with the performance . . . of this contract."
- Southern "shall provide, erect and maintain all reasonable safeguards for safety and protection of all persons, including workmen and the public."

- "All materials resulting from the demolition . . . shall be removed from the site and **properly disposed of by Southern**."

Id. at 4-5; Appx B at 2 (emphasis added).

By contrast, the contract gave Gusdorf or the Bank only three rights: the right of access to the site; the right to reject defective work; and the right to terminate the contract. P.Ex. 137 at 5.

The unambiguous terms of that contract prove that Southern was not the Bank's agent. The right to control the putative agent's "physical conduct" means "the right to control the means and manner of the service," not the right to control "the ultimate results of the service." M.A.I. 13.06, 1965 Committee Comment. This contract clearly states that Southern is "solely responsible" for the "means" of the service, which defeats agency.

Williamson v. Southwestern Bell Tel. Co., 265 S.W.2d 354 (Mo. 1954), is directly in point. The telephone company hired a tree trimmer. The tree trimmer's truck collided with plaintiff's car, causing serious injury. The trial court directed a verdict against plaintiff on her claim that the tree trimmer was the telephone company's agent.

On appeal, plaintiff argued that the contract reserved enough control to the telephone company to make the tree trimmer an agent. She pointed to provisions that:

- Required "the contractor to dispose of the timber or brush 'in the manner arranged for by the Telephone Company's representative.'"
- Required the contractor to "'cut and prune all trees, shrubs and hedges in accordance with'" the telephone company's "'tree pruning methods.'"

- Furnished the tree trimmer with "blueprints and plats specifying exactly what work was to be done."
- Granted the telephone company foreman the right to "direct which plot or plat Lillard's employees were to work in order to facilitate the performance of the entire work being done."

265 S.W.2d at 358.

This Court held that these provisions did not establish any right of physical control over the tree trimmer. Rather, they "go no further than to enable" the telephone company to assure that the work "shall be properly performed." Id. (citations and internal punctuation omitted):

> This contract, considered in its essence and entirety, plainly established the relationship of independent contractor and the factors and clauses relied on by the appellant do not reserve such right of control as to alter the relationship and are not sufficient to support the contrary inference of master and servant.

265 S.W.2d at 359.

In Trinity Lutheran Church v. Lipps, 68 S.W.3d 552 (Mo. App. 2001), plaintiff obtained a verdict on the theory that a logger was an agent. Based on Williamson, the court of appeals reversed. The Court noted all of the items alleged to have given the telephone company a right of control in Williamson, id. at 558, and held that they were irrelevant. An independent contractor does not, as a matter of law, become an agent merely because the alleged master may have "some measure of control over the

contractor's work, so long as it is limited to securing proper performance of the work." Id. at 559.

The Court then considered all of the evidence in both Williamson and Lipps establishing that the alleged agents were, in fact, independent contractors:

- The contractor "submitted a bid for the work, was awarded the contract, and was to be paid by the job."
- The contractor "furnished 'all labor, tools, equipment, vehicles, and supervision required' to complete the task."
- The contractor "was required to provide his own liability insurance with specified policy amounts."
- The contractor "agreed to indemnify the telephone company for any property damage or other damages as a result of his neglect."
- The contractor "controlled the details of the tree trimming, he was a tree trimmer by trade."
- "The agreement reached between Logger and Landowner endured only as long as it took Logger to cut all the trees."
- "Logger determined the rate at which his crew worked."
- "Landowner was not in the business of tree trimming."

68 S.W.3d at 559.

The instant case presents an exactly parallel set of facts. As a result, "no reasonable conclusion exists but that [Southern] was an independent contractor and that

no master-servant relationship existed." Id. at 560. Accord, Collins v. Feldman, 991 S.W.2d 718, 720 (Mo. App. 1999) (affirming summary judgment when "[t]here was no evidence . . . that J&K had the right or exercised the power to control the details of delivery"); Hougland, 939 S.W.2d at 35 ("[a]lthough Carron was required to deliver the newspapers by a certain time every day, the details of the delivery and distribution of the newspaper . . . were within Carron's discretion").

Plaintiffs' principal argument at trial was that Ms. Myers and Mr. Winter testified that the Bank had the right to direct Southern where to take the concrete. Tr. 1393; 1613-14. For three independent reasons, this testimony does not make a submissible case of agency. First, to the extent that this testimony reflects the witnesses' interpretation of the contract, it is irrelevant:

> There is no issue of fact for the jury to decide "if the 'facts' alleged to be in dispute are actually differing opinions of the parties of the legal effect of documents or actions which determine their respective rights."

Hougland, 939 S.W.2d at 33.

Second, to the extent that it purports to contradict the contract, this testimony is inadmissible parol evidence. Under Missouri law, extrinsic evidence "generally is not admissible to vary, add, or contradict terms of an unambiguous and complete written document." Ironite Prods. Co. v. Samuels, 985 S.W.2d 858, 861-62 (Mo. App. 1998). This is not a rule of evidence, but a rule of law: "If evidence is received, with or without objection, it violates the parol evidence rule and the decision must be made solely on the writing; parol evidence may not be considered." Id. at 862 (citations and internal

punctuation omitted). Accord, Poelker v. Jamison, 4 S.W.3d 611, 613 (Mo. App. 1999). The rule applies as much to the scope and existence of agency as to any other contract. Rosenthal v. Jordan, 783 S.W.2d 452, 456 (Mo. App. 1990). Ironite reversed a trial court judgment precisely because it did rest on inadmissible parol evidence.

The contract in the instant case is unambiguous. That contract says that Southern, not the Bank, "shall supervise and direct the work." P.Ex. 171 at 4. The contract says that Southern, not the Bank, "shall be solely responsible" for the "means" of the work. Id. The contract says that all demolition materials "shall be . . . properly disposed of by Southern," not by the Bank. Id. Appx B at 2. Testimony that the Bank did have a right to control the physical conduct of Southern – i.e., the "manner and means" of completing the work – would directly contradict these provisions and is inadmissible.

Third, as a matter of law, evidence that the Bank had the right to tell Southern "exactly where to take" the concrete, Tr. 1393, does not mean that the Bank had the right to control Southern's physical conduct. There is no evidence that the Bank had the right to dictate the manner and means by which Southern carried out its duties. The right to tell Southern where to take the waste is merely the right to require proper performance of the contractor's duties – exactly what this Court in Williamson and the court of appeals in Lipps held is insufficient to establish an agency relationship:

> The right to insure proper performance of a contract is insufficient in itself to justify the imposition of such liability. . . . Instead, the control must go beyond securing compliance with the contracts; the owner must be controlling the physical activities of the employees of the

> independent contractors or the details of the manner in which the work is done.

Halmick v. SBC Corporate Services, Inc., 832 S.W.2d 925, 929 (Mo. App. 1992).

Plaintiffs did not have a submissible case of agency. Thus, the Bank is entitled to judgment on plaintiffs' respondeat superior claims and on their claim for trespass against the Bank, because the explicit premise of that claim is the existence of an agency relationship. L.F. 188.

II. The Trial Court Erred In Entering Judgment Against The Bank On Plaintiffs' Negligence Theory, Because Plaintiffs Did Not Have A Submissible Case Of Negligence In That The Bank Owed No Duty To Plaintiffs To Follow The Work Plan.

Plaintiffs submitted their negligence claim against the Bank on the theory that the Bank failed to follow the Work Plan – i.e., it failed to put the concrete in a landfill. L.F. 190. Plaintiffs were not parties to that contract. Nor were they part of a relatively small and easily identifiable group likely to be affected by the work plan. As a result, the Bank owed no duty to plaintiffs to comply with the work plan.

The first prerequisite to an action for negligence is "the existence of a duty on the part of the defendant to protect plaintiff from injury." Berga v. Archway Kitchen & Bath, 926 S.W.2d 476, 478 (Mo. App. 1996). That duty must be owed "to the individual complaining." Id. at 479. "Whether a duty exists is a question of law for the court to decide." Weaks v. Rupp, 966 S.W.2d 387, 392 (Mo. App. 1998). This Court reviews

questions of law de novo. St. Louis County v. B.A.P., Inc., 18 S.W.3d 397, 404 (Mo. App. 2000).

Plaintiff were not parties to the Work Plan. The "general common law rule" is that a party to a contract "owes no duty to a plaintiff who was not party to the contract, nor can that plaintiff sue for the negligent performance of that contract." Fleischer v. Hellmuth, Obata & Kassabaum, 870 S.W.2d 832, 834-835 (Mo. App. 1993). Accord, L.A.C. v. Ward Parkway Shopping Center Co., 75 S.W.3d 247, 262 (Mo. banc 2002) ("contract may not generally be the source of a tort duty by one of the contract parties to a third party").

There are two reasons for this rule, both of which fully apply to the instant case. First, allowing persons not privy to the contract to sue for negligence "would lead to excessive and unlimited liability." Fleischer, 870 S.W.2d at 834. In every case in which Missouri courts have allowed a stranger to a transaction to sue for negligence, that stranger has been a member of a limited class of people either known to or readily identifiable by the defendant at the time of the transaction. Compare Slate v. Boone County Abstract Co., 432 S.W.2d 305, 307 (Mo. 1968) (buyers of property could sue abstract company which "knew that the abstract was to be used and relied upon by these plaintiffs"), with Anderson v. Boone County Abstract Co., 418 S.W.2d 123, 128 (Mo. 1967) (subsequent purchasers of property could not sue abstract company for "negligent performance of a contractual duty").

This Court's opinion in Donahue v. Shughart, Thompson & Kilroy, P.C., 900 S.W.2d 624 (Mo. banc 1995), illustrates this rule. The issue in Donahue was whether the

intended beneficiaries of a testamentary transfer of property could sue the grantor's lawyer for malpractice. This Court held that these strangers to the transaction could sue, precisely because the class of potential plaintiffs was limited:

> If the transaction was specifically intended to benefit the plaintiff, liability is not extended to an unlimited class . . . . [R]ecognizing liability to an intended beneficiary of a testamentary transfer does not unduly burden the legal profession when liability is limited to those the client intended but is no longer able to benefit and where no other remedy exists to prevent harm to the beneficiaries.

900 S.W.2d at 628.

In the instant case, the class of potential plaintiffs is neither limited nor identifiable. When the Bank agreed to the Work Plan, it had no way to foresee that any failure to follow that Plan would impact plaintiffs any more than the rest of society. If plaintiffs can sue the Bank for negligent failure to follow the Work Plan, so can anyone else who ever came in contact with the concrete or the PCBs. Tenants in the trailer park, Southern's drivers, other trespassers on plaintiffs' property, even the people who hauled the concrete away, would all have a claim for negligence against the Bank. There is no principled way to distinguish these claims from plaintiffs'.

Second, allowing strangers to the transaction to sue for negligence would unreasonably burden contracts by depriving the parties of the flexibility to respond to changing circumstances:

> The object of the parties in inserting in their contract specific undertakings with respect to the work to be done is to create obligations

> and duties inter sese. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in the contract in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contract.

Westerhold v. Carroll, 419 S.W.2d 73, 77 (Mo. 1967).

The need for flexibility is particularly important in the area of environmental work plans, which change constantly in response to new conditions. In those circumstances, "it behooves the people that are responsible for implementing the work plan to make appropriate changes." Tr. 560. Indeed, even without changing the plan, the people responsible for implementing it "may deviate as long as the original objectives of the work plan are being achieved." Id.

Had the parties to the Lackland Road Work Plan wanted to amend it to exempt concrete containing less than 10 ppm from disposal in a landfill, they could legally have done so. Plaintiffs stipulated that concrete with that level of trace contamination was not hazardous waste under either state or federal law. Tr. 161-62. The U.S. EPA considers such material to be clean fill, Tr. 2510-11, and the Missouri DNR takes the same position. Tr. 2528. There is no reason to give plaintiffs veto power over changes to a contract that the parties can legally make.

Finally, allowing strangers to an environmental work plan to enforce the original version thereof will have a substantial deterrent effect on parties' willingness to enter such agreements in the future. Environmental work plans are a good thing for society,

because they permit the speedy and efficient remediation of contaminated sites. If a change in such plans permits an unlimited array of third parties to file negligence claims, far fewer responsible parties will enter into such plans.

The court of appeals held that strangers to a contract could sue for its negligent performance, provided only that injury to the plaintiffs was foreseeable. That "exception" would swallow the general rule and would impose essentially unlimited liability on parties to contracts. Every prior Missouri court to consider that theory has rejected it. Anderson, 418 S.W.2d at 129 ("general foreseeability" insufficient to create duty in "the face of the entirely indeterminate extent, magnitude and duration of the liability"); Lindner Fund v. Abney, 770 S.W.2d 437, 438 (Mo. App. 1989) ("[a]ppellants must bring themselves within a limited foreseeable class or their petition will fail"); Midamerican Bank & Trust Co. v. Harrison, 851 S.W.2d 563, 565 (Mo. App. 1993) ("liability in limited cases where the accountant is not in privity with the third party . . . is not extended to every reasonably foreseeable consumer of financial information") (citations and internal punctuation omitted).

Plaintiffs in Fleischer made precisely the same argument: "once foreseeability is established, the absence of privity and the absence of physical damage are irrelevant, and plaintiffs may recover for economic losses." 870 S.W.2d at 834. The Fleischer court expressly rejected that theory:

> If foreseeability of injury is the focus, as plaintiffs argue using Chubb, then there is no principled reason why liability would not extend beyond the construction manager to the subcontractors, materialmen and workmen who suffered economic

injury as a result of defendant's alleged negligence. This is precisely the type of situation which the rule requiring privity is intended to prevent.

Id. at 837.

This Court's opinion in L.A.C. in no way supports a contrary conclusion. In L.A.C., plaintiff was raped in a shopping center. She sued, among others, the company that supplied security service at the mall. The majority opinion in this Court relied on the contract between the mall owner and the security service, plus the security service's training manual and policy manual. 75 S.W.3d at 251-53. These documents established that the purpose of the contract was to assist the mall owner "in its duty to take reasonable measures to protect mall customers from criminal activity." 75 S.W.3d at 262. As a result, this Court found that plaintiff was a third party beneficiary of the contract, id., – i.e., a person "for whose primary benefit the parties contract." Id. at 260.

Acknowledging the general rule of non-liability to strangers to the transaction, 75 S.W.3d at 262, this Court concluded that:

> The provisions of the contract, as well as the portions of the training manual and the policy and procedures manual, . . . clearly set out IPC's general duty to exercise reasonable care to prevent foreseeable harm to plaintiff, and this general duty is sufficient to support plaintiff's claim.

Id. at 263 (citations and internal punctuation omitted).

In short, the basis for L.A.C. is that the defendant intentionally assumed a duty of reasonable care to ensure plaintiff's safety. There is no evidence that the Bank ever intended to assume a duty to private property owners to deposit this concrete in a landfill.

Since plaintiffs were not parties to the Work Plan, the Bank owed them no duty to follow it. This conclusion mandates a reversal of the negligence judgment against the Bank.

III. The Trial Court Erred In Entering Judgment Against The Bank On Plaintiffs' Claim For Punitive Damages, Because Plaintiffs Did Not Have A Submissible Punitive Damage Case, In That:

A. As A Matter Of Law, A Court Cannot Punish A Party For Exercising Its Constitutional Right To Take A Case To Trial.

B. There Is Substantial And Uncontradicted Evidence That Both Southern And The Bank Offered To Remove The Concrete From Plaintiffs' Property.

C. There Is No Evidence That Either Southern Or The Bank Knew That Their Conduct Created A High Probability Of Injury Or Of Complete Indifference To Or Conscious Disregard Of Plaintiffs' Rights; and

D. It Violates Due Process To Award Punitive Damages In The Absence Of Any Of The Gore/Campbell Reprehensibility Factors.

The "uniform tenor of the recent cases is that punitive damages are to be the exception rather than the rule." Menaugh v. Resler Optometry, Inc., 799 S.W.2d 71, 75 (Mo. banc 1990). "The test for punitive damages in a product liability case is a strict one," and "similar considerations apply" in negligence cases. Bhagvandoss v. Beiersdorf, Inc., 723 S.W.2d 392, 397 (Mo. banc 1987). Thus, punitive damages are an "extraordinary" and "harsh" remedy that "should be applied only sparingly." Rodriguez

v. Suzuki Motor Corp., 936 S.W.2d 104, 110 (Mo. banc 1996). Accord, Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848, 866 (Mo. App. 2000).

To make a submissible punitive damage case, the "defendant's conduct must be tantamount to intentional wrongdoing." Lopez v. Three Rivers Elec. Coop., 26 S.W.3d 151, 160 (Mo. banc 2000). The Court reviews the issue de novo as a matter of law, taking the evidence in the light most favor to plaintiffs. Mogley, 11 S.W.3d at 747.

A. Plaintiffs Did Not Have A Submissible Case For Punitive Damages Based On Their Closing Argument Because, As A Matter Of Law, A Court Cannot Punish A Party For Exercising Its Constitutional Right To Take A Case To Trial.

The central thesis of plaintiffs' closing argument was that the jury should punish the Bank because it had refused to acknowledge its responsibility to pay for removing the concrete – i.e., it had defended the case instead of capitulating to Mr. Kaplan's demands. This Court has explicitly held that this conduct will not support an award of punitive damages.

Mr. Kaplan testified that he wanted $20 million in punitive damages from the Bank for "the years it took . . . to get them in here today." Tr. 2160. Plaintiffs told the jury that the Bank should be punished because it "would not even pay a dime" to test the concrete. Tr. 2682. They argued that "[y]ou have to punish and deter" someone who "doesn't accept responsibility"; that when a company tries "to avoid responsibility, you have to tell them in a language that they seem to understand." Tr. 2687. They concluded

by telling the jury to send the Bank a message, because "[t]hey are not responsible" and "accept no responsibility." Tr. 2724.

The problem with this argument is that the Bank had no responsibility either to test or to remove the concrete unless Southern was its agent. Plaintiffs moved for a directed verdict on the agency issue, and the trial court denied it. Tr. 2590. The necessary implication of that ruling is that a reasonable jury could reject plaintiffs' agency theory. "When a party acts in good faith and honestly believes that his act is lawful, he is not liable for punitive damages." Hostler v. Green Park Dev. Co., 986 S.W.2d 500, 507 (Mo. App. 1999). Submitting a good faith dispute to a jury does not warrant punitive damages.

In Alcorn v. Union Pac R.R. Co., 50 S.W.3d 226 (Mo. banc 2001) this Court so held. Alcorn was a grade crossing accident involving extremely serious injuries. A Union Pacific witness testified that the railroad "does not take any responsibility for identifying hazardous crossings and spends no money on its own" to eliminate them. 50 S.W.2d at 248-49. In reversing a jury verdict for punitive damages, this Court held:

> A defendant's aggressive defense at trial on either the issue of breach of duty or causation may supply, in the juror's minds, the "complete indifference" or "conscious disregard" element. That is why careful judicial scrutiny is needed to determine whether the conduct was so egregious that it was "tantamount to intentional wrongdoing."

Id. at 248.

The Missouri Constitution guarantees that the courts shall always be open and that parties have a right to trial by jury. Mo. Const. Art. I §§ 14, 22(a). "[L]itigation is as

American as apple pie." I.S. Joseph Co. v. J. Lauritzen A/S, 751 F.2d 265, 267 (8th Cir. 1984). The Bank's decision to exercise its constitutional right to a jury trial cannot be the basis for a punitive damage award.

B. Plaintiffs Did Not Have A Submissible Case For Punitive Damages Based On Trespass, In That There Is Substantial And Uncontradicted Evidence That Both Southern And The Bank Offered To Remove The Concrete From Plaintiffs' Property.

Instruction No. 15 required plaintiffs to prove either an evil motive or "reckless indifference to the rights of others" as a prerequisite for punitive damages. L.F. 194. There is no evidence that either Southern or the Bank had any evil motive. There is substantial and uncontradicted evidence that both Southern and the Bank repeatedly offered to remove the concrete from plaintiffs' property. As a matter of law, that evidence precludes a finding of reckless indifference.

In Missouri, even inept efforts to rectify a continuing trespass preclude the imposition of punitive damages. Shady Valley Park & Pool v. Fred Weber, Inc., 913 S.W.2d 28, 37 (Mo. App. 1995). In the instant case, it is undisputed that Southern offered to pay for testing at the very first meeting to discuss the issue. Tr. 2040. Mr. Winter signed a contract with ATC for that testing on April 14, 1997. Tr. 1667. Southern supplied the equipment to build a road giving ATC access to the site, Tr. 2055; 2201-02, and the backhoe and operators enabling ATC to test the concrete. Tr. 1667.

Mr. Winter and Mr. Kaplan both agree that, at the initial meeting, Southern offered to remove the concrete at its expense and to restore the property to its original condition. Tr. 1699; 2189-90. They also agree why that offer was not implemented: Mr. Kaplan refused to allow it. Initially, Mr. Kaplan refused access to the property until testing could be completed, Tr. 1730; 2279, and Southern agreed to do nothing until specifically authorized by Mr. Kaplan. Tr. 2279. Southern obtained bids for other operators to remove the concrete, Tr. 1699, and – after the test report arrived in mid-May – offered again to remove it. Tr. 1758-59; 2210. Mr. Winter and Mr. Kaplan are in agreement that Mr. Kaplan did not authorize removal. Tr. 1775; 2285.

Although plaintiffs copied the Bank on some of their correspondence with Southern during the first six months of 1997, they otherwise ignored the Bank. On June 12, 1997, Mr. Winters advised plaintiffs that the Bank wanted a letter setting forth plaintiffs' demands. P.Ex. 232; Tr. 2220. Before that date, plaintiffs had never made any demand on the Bank. Tr. 2220. On June 20, 1997, Mr. Kaplan wrote the Bank asking it to attend a meeting on June 26, 1997. P.Ex. 236. That letter was the first correspondence directly addressed to the Bank asking it to do something about the concrete. Tr. 2227.

At that meeting, plaintiffs requested that the Bank remove the concrete, dispose of it properly, and perform sufficient tests on the site to satisfy DNR. They also wanted a release from the property owners, a release and indemnity from Southern and the Bank, and their out of pocket expenses. Tr. 857-60. On July 3, 1997, their counsel reduced these demands to a formal written letter. P.Ex. 242.

The parties are in agreement on the Bank's response to this demand. By mid-July, the Bank had offered to remove all the concrete from the site and have ATC supervise the cleanup. P.Ex. 245. Mr. Kaplan testified:

> Q: So at this point at least, via the attorneys, the bank has agreed to remove it. That bank has agreed to have ATC supervise. You're saying you can't come through my property, and you don't have an agreement on the indemnity. Is that a fair summary of what this is saying?
>
> A: It is.

Tr. 2239. Plaintiffs responded that the Bank had to accept all of their demands in full in order to resolve any of them. Tr. 2261.

According to his own testimony, the reason for these rejections was that Mr. Kaplan preferred a lawsuit to an immediate resolution of the problem. He had instructed his attorney to file suit as early as March 1997. Tr. 2259. By mid-June, counsel was drafting the suit, Tr. 2219, and Mr. Kaplan had decided that he was going to take legal action. Tr. 2221. Thus, Mr. Kaplan had made up his mind to sue the Bank before he ever even made demand upon it. And he refused the Bank's offer to remove the concrete solely because the Bank would not agree to all of his demands.

In June 1999, after plaintiffs agreed with Lowe's to remove the concrete, Southern and the Bank again offered to remove the concrete at no expense to plaintiffs. As evidence of their good faith, they placed $250,000 into escrow. Tr. 889; 2143; P.Ex. 286. This was an unconditional offer; plaintiffs were free to accept it and continue to prosecute

their lawsuit. P.Ex. 286. Predictably, plaintiffs characterized this offer as "unacceptable." P.Ex. 298 at 3.

Plaintiffs' response to that offer does not offer to discuss or negotiate about any of these alleged concerns. Nor does it suggest any desire to resolve them. Rather, the entire letter reads like a declaration of war (discovery has "revealed the dishonesty of the Bank's assertion" that Southern was not its agent). P.Ex. 298 at 2.

Many of the 21 reasons were self-evidently pretextual. For example, plaintiffs objected that the offer did not indemnify them for any claims arising from the dumping. P.Ex. 298 at 3. Since the offer was unconditional, plaintiffs were free to press their claims for indemnification in the lawsuit. The professed concern about power line relocation and site restoration was irrelevant, since those issues affected only the Faye Avenue property owners. P.Ex. 311 at 3. Other issues, such as terminating the license after the project was complete or adding plaintiffs as named insureds could easily have been resolved had plaintiffs honestly wanted Southern and the Bank to clean up the property. The most probable explanation for this rejection is that Mr. Kaplan, consistent with his previous conduct, preferred a lawsuit to a solution.

Assuming that some of plaintiffs' concerns about this proposal were legitimate, it makes no difference. Southern and the Bank put a quarter of a million dollars in escrow to fund a complete and unconditional cleanup. Even if inadequate, that offer hardly constitutes "reckless indifference" to plaintiffs' rights.

Shady Valley is directly in point. In that case, Weber had a contract to rebuild a highway adjacent to plaintiff's land. The construction caused a substantial amount of

siltation in Shady Valley's ponds, which ultimately destroyed its fish farming business. Weber made a number of unsuccessful efforts to prevent the mud flows, following which Shady Valley sued for, inter alia, trespass. The trial court directed a verdict for Weber on Shady Valley's claim for punitive damages.

On appeal, the court of appeals affirmed. The legal test for punitive damages was whether "Weber's conduct showed complete indifference to or a conscious disregard for Shady Valley." 913 S.W.2d at 37. Weber's efforts to correct the siltation, however ineffective, proved exactly the opposite of conscious disregard:

> Although Weber's actions were ineffective and ultimately caused it to be liable for the damages to Shady Valley, they do not rise to the level of justifying punitive damages. . . . Despite the ineptness of Weber's efforts to prevent the mud and siltation from entering the lakes, there was not a conscious disregard nor a complete indifference for Shady Valley's lakes. We conclude that punitive damages were properly not submitted.

Id.

In White v. James, 848 S.W.2d 577 (Mo. App. 1993), the parties owned adjacent tracts of land. Defendants dug a trench for a sewer line on White's land, based on the erroneous belief that the city had an easement across that land. Thereafter, defendants offered to repair White's property and compensate White for his expenses, in exchange for an easement. Defendants also offered to purchase White's property. When

settlement negotiations failed, defendants repaired White's property, although White was not satisfied with those repairs.

White sued for trespass. The trial court directed a verdict for defendants on the claim for punitive damages, because the parties' settlement discussions "indicate a lack of reckless indifference to Plaintiff's rights." 848 S.W.2d at 581. The appellate court agreed:

> Here, the parties negotiated in good faith (the Clinic acting on advice of counsel) for an easement while "fluid" was in the trench. When negotiations failed, Plaintiff's property was promptly repaired. . . . [T]his evidence fails to establish a reckless disregard for Plaintiff's rights.

Id.

In the instant case, Southern put the concrete on plaintiffs' property at the request of Mr. Werre and in the mistaken belief that his property extended to the far bank of the creek. Tr. 1724-27. Southern offered to pay for removal immediately upon learning of the problem and the Bank made the same offer within three weeks of being asked to remove the concrete. The only reason that the removal was not promptly completed was that plaintiffs refused these offers. Regardless of whether plaintiffs had good grounds for that refusal, the evidence entirely "fails to establish a reckless disregard for Plaintiff's rights." 848 S.W.2d at 581.

Plaintiffs did not have a submissible case of punitive damages arising from their trespass claim.

C. Plaintiffs Did Not Have A Submissible Case For Punitive Damages Based On Negligence, In That There Is No Evidence That Either Southern Or The Bank Knew That Their Conduct Created A High Probability Of Injury Or Of Complete Indifference To Or Conscious Disregard Of Plaintiffs' Rights.

A submissible punitive damage claim on a negligence theory has two components. First, plaintiffs must prove that defendants knew that their conduct had a high probability of causing injury. Second, plaintiffs must prove that defendants were completely indifferent to or consciously disregarded plaintiffs' rights. Plaintiffs are nowhere close to either mark.

There is no proof that either Southern or the Bank had the requisite knowledge of a high degree of probability of injury:

> In a negligence case, punitive damages are awardable only if, at the time of the negligent act, the defendant knew or had reason to know that there was a high degree of probability that the action would result in injury.

Lewis v. Fag Bearings Corp., 5 S.W.3d 579, 583 (Mo. App. 1999), citing Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc., 700 S.W.2d 426, 436 (Mo. banc 1985).

The knowledge requirement is a exceptionally high one, as both Alcorn and Lopez make clear. In each case, this Court considered three factors "[w]eighing against the submission of punitive . . . damages." Lopez, 26 S.W.3d at 160; Alcorn, 50 S.W.3d at 248:

- "[P]rior similar occurrences known to the defendant have been infrequent." There is no evidence that the Bank ever previously violated an environmental work plan.

- "[T]he injurious event was unlikely to have occurred absent negligence on the part of someone other than the defendant." Had Southern properly determined where plaintiffs' property line was, it never would have dumped the concrete on their property.

- "[T]he defendant did not knowingly violate a statute, regulation or clear industry standard designed to prevent the type of injury that occurred." Because the regulatory agencies treat concrete at less than 10 ppm as clean fill, there is no statute, regulation or industry standard requiring disposal of this concrete in a landfill. The disposal at Mr. Winter's farm and his neighbor's farm was perfectly legal. Had Southern gotten the necessary permits under the Missouri Clean Water law, and dumped only on the homeowners' land, that would have been perfectly legal too.

Thus, it would have been perfectly legal for the Bank and the prior owner to amend the work plan to delete the requirement for disposing of this concrete in a landfill. On that scenario, plaintiffs would have had no claim even for actual damages against the Bank, let alone punitive damages. It is a mighty odd punitive damage claim that the defendant can avoid simply by amending a contract with someone other than the plaintiff.

The defendants' conduct in Lopez and Alcorn was much more reprehensible than the Bank's conduct in the instant case, but this Court reversed an award of punitive damages in each case. In Lopez, a helicopter crashed into an unmarked electrical wire across a river, killing all four occupants. Trees and other vegetation obstructed the support towers and the electrical wire blended into the background making it virtually

impossible to see. A plane had crashed into the wire in 1975, killing three people, and another near-miss had occurred in 1974. This Court held that the "evidence did not show that Three Rivers [had] knowingly violated a duty" and reversed an award of punitive damages. 26 S.W.3d at 161.

In Alcorn, plaintiff suffered serious and permanent injuries as a result of a collision with a train at a grade crossing. Vegetation and the shape of the land prevented the driver of the car from seeing either the train or the train tracks, in violation of federal standards. There had been a fatal accident four months earlier at this very crossing and several near misses. There were no gates or warning lights, although the State had authorized preliminary work to install them. This Court held that this evidence did not establish conduct "tantamount to intentional wrongdoing," and reversed a punitive damage award. 50 S.W.3d at 249.

If those cases did not warrant punitive damages, the instant case cannot possibly justify such an award. Those cases involved death or serious bodily injury. This case involves purely economic loss with no hint of deception. As noted, there was no legal requirement to put the concrete in a landfill, as both EPA and DNR treated the concrete as clean fill despite the trace amount of PCBs in it. Tr. 2510-11; Tr. 2528. There is no evidence that the Bank knew that Southern was depositing the concrete on plaintiffs' property. There is no evidence that the Bank knew the concrete was contaminated.

Plaintiffs' theory against Southern was that it "failed to properly dispose of the concrete," L.F. 197, presumably by putting it in a landfill. Southern had no obligation to plaintiffs to do so. Plaintiffs were not parties to the contract between Gusdorf and

Southern. Southern was not a party to the Work Plan and the regulatory authorities treated this concrete as clean fill. Mr. Winter testified that he thought this concrete was clean, Tr. 1662, and there is no evidence to the contrary. That assumption may or may not have been negligent, but mere negligence does not constitute knowledge of a high probability of injury which alone warrants submission of punitive damages.

A negligence-based claim for punitive damages also requires proof of "complete indifference to or conscious disregard for" the rights of others. Lopez, 26 S.W.3d at 160. Plaintiffs failed to satisfy this prong for the same reason they have no claim for punitive damages in trespass: both defendants promptly and repeatedly offered to remove the concrete. Attempting to rectify a situation, however inadequately, is not "complete indifference" or "conscious disregard."

In Bhagvandoss, this Supreme Court held that plaintiffs must produce evidence of complete inaction in the face of a known danger. Bhagvandoss involved a hospital bandage that was sold in an unsterile condition, causing serious injury to plaintiff. The defendant had provided a warning which the jury found was inadequate. While affirming an award of actual damages, this Court reversed the punitive award:

> The letter sought to warn users that the product should not be used in sterile intensive procedures. We have held that the jury might well find that the letter did not give sufficient warning that the product should not be used for dressing surgical wounds such as the plaintiff sustained. But inadequate communication cannot be equated with conscious disregard.

723 S.W.2d at 398 (emphasis added). The same is true for allegedly inadequate efforts to clean up plaintiffs' property.

Plaintiffs do not have a submissible negligence-based claim for punitive damages.

D. It Violates Due Process To Award Punitive Damages In The Absence Of Any Of The Gore/Campbell Reprehensibility Factors.

In State Farm Mut. Auto Ins. Co. v. Campbell, ___ U.S. ___, 155 L.Ed.2d 585 (2003), the Supreme Court announced a five factor test to determine whether conduct is sufficiently reprehensible to warrant punitive damages. Courts must consider:

> whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

155 L.Ed.2d 585, 602 (2003), citing BMW of N. Am. v. Gore, 517 U.S. 559 (1996). Campbell squarely holds that "the existence of any one of these factors . . . may not be sufficient to sustain a punitive damage award," while "the absence of all of them renders **any** award suspect." Id. (emphasis added).

Because this point presents a constitutional issue, this Court's standard of review is de novo. In Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 531 (2001), the Supreme Court held that federal appellate courts must review such challenges de novo, rather than under an abuse of discretion standard. 149 L.Ed.2d at 687. The

reasoning behind Leatherman is equally applicable to state appellate courts, and Alcorn so recognizes. 50 S.W.3d at 247 (submission of punitive damage claims "warrants special judicial scrutiny").

The record in the instant case satisfies none of the Gore/Campbell reprehensibility factors:

- The "harm BMW inflicted on Dr. Gore was purely economic in nature." 517 U.S. at 576. Similarly, in the instant case, the $646,000 in actual damages that the jury awarded reflected "the expenses [plaintiffs] had in cleaning up the property." Tr. 2156. There has never been any suggestion that this incident caused any physical injury to anyone.
- "BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others." 517 U.S. at 576. Here, the trace levels of PCBs on the concrete were not "a hazard to the health or the environment." Tr. 2443. Both EPA and DNR deemed the concrete to be clean fill. Tr. 2510-11; 2525.
- Economic injury warrants a substantial punitive award only "when done intentionally through affirmative acts of misconduct . . . or when the target is financially vulnerable." 517 U.S. at 576. There is no evidence that Southern or the Bank intentionally tried to injure plaintiffs. By his own admission, Mr. Kaplan is "not a poor man" and he had the financial resources to prosecute his claim for actual damages. Tr. 2160-61.

- "[R]epeated misconduct is more reprehensible than an individual instance of malfeasance." 517 U.S. at 577. There is no evidence that Southern ever dumped material, contaminated or otherwise, on anyone else's property without permission. There is no evidence that the Bank ever previously violated an environmental work plan.
- The record "discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive." 517 U.S. at 579. Plaintiffs did not submit punitive damages on any such basis and there is no evidence that Southern or the Bank engaged in any such conduct. On the contrary, Southern paid for testing and both Southern and the Bank repeatedly offered to remove the concrete. Tr. 1699; 2189-90; 2143; 2239; P.Ex. 286.

In short, this case involves **none** of the Gore/Campbell reprehensibility factors. Under the plain holding in Campbell, it violates due process to award any punitive damages under those circumstances. If a punitive award would violate due process, plaintiffs cannot have a submissible case for such an award.

IV. The Trial Court Erred In Denying The Bank's Motion To Remit The Punitive Award, Because The $7 Million Punitive Judgment Violates The Bank's Right To Due Process, In That The Degree Of Reprehensibility Is Minimal And The Award Greatly Exceeds Civil Or Criminal Penalties For Such Conduct.

Assuming that plaintiffs had a submissible case for punitive damages, the $7 million award violates due process under the principles announced in Gore and Campbell. There is no evidence of reprehensibility; the 11 to 1 ratio between punitive and actual damages is grossly excessive; and the civil or criminal penalties for similar conduct are minimal. At most, due process would permit a punitive damage award equal to the actual damages.[2]

The "most important" criterion for assessing a punitive damage award is "the degree of reprehensibility of the defendant's conduct." BMW, 517 U.S. at 575. The most that can be said about the Bank qua Bank is that it failed adequately to supervise Southern and it asked for a jury trial on whether Southern was its agent. There is nothing at all reprehensible about such conduct. The Bank has already explained why Southern's conduct involves none of the Gore/Campbell reprehensibility factors.

On the second Gore criterion, the opinion makes clear that there is no "simple mathematical formula" by which to compare the ratio of actual to punitive damages. Id. at 582. Instead, the Court suggested reliance on a number of different factors:

- The courts should consider "the harm likely to result" as well as the harm that in fact resulted.

[2] Under Leatherman, the Bank is entitled to de novo review of this legal issue. 532 U.S. at 431.

- A relatively low actual damages award might support a higher ratio if "a particularly egregious act has resulted in only a small amount of economic damages."
- A high ratio may be justified when the "injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine."

517 U.S. at 581-82.

None of those factors warrant the imposition of punitive damages almost 11 times the amount of the actual damages. Dumping the concrete on plaintiffs' property carried no risk of harm to anyone else. The injury was obvious; there is no non-economic harm; and the award of actual damages was substantial.

Campbell has made clear that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." 155 L.Ed.2d at 605-06. When, as here, "compensatory damages are substantial," then "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Id. at 606.

To be sure, the Court held in TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 (1993), that a ratio of ten to one did not "jar one's constitutional sensibilities." But that case involved intentional, fraudulent misconduct as part of a "pattern and practice of fraud, trickery and deceit." Id. at 453 (citations and internal punctuation omitted) By contrast, in Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991), the Court held that a punitive award based on a single act of fraud was "close

to the line" when it was merely four times the actual damage. The instant case involves neither fraud nor repeated misconduct.

The third Gore criterion is the "civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. A court reviewing for excess punitive damages "should accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." Id. Missouri does not have any civil penalties that apply to this type of trespass. It does authorize treble damages for trespass involving removal of crops or minerals, § 537.340, and double damages for malicious destruction of personal property or removing gates. §§ 537.330; 537.350.

On the criminal side, knowing trespass is a class B felony and unintentional trespass is an infraction. §§ 569.140; 569.150. The maximum fine for a corporation for a class B felony is $2,000 and for an infraction $500. § 560.021. Clearly, these provisions do not come close to supporting a $7 million punitive award for trespass.

In BMW, the maximum civil penalty for BMW's violation was $2,000, and the maximum penalty in any state for such a violation was $10,000. The Supreme Court held that none of these statutes "would provide an out-of-state distributor with fair notice that the first violation . . . of its provisions might subject an offender to a multimillion dollar penalty." 517 U.S. at 584. The same is true in the instant case. Given the virtually complete lack of reprehensibility and the minimal civil and criminal sanctions for similar conduct, the Bank respectfully submits that punitive damages, if allowed at all, should not exceed the actual damages.

Conclusion

For these reasons, the Bank respectfully prays that the Court reverse the judgment against the Bank and remand with instructions to dismiss the petition. Alternatively, the Bank respectfully prays that the Court reverse the punitive damage award or remit it to not more than $650,000.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 13,886 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 97 SR-2. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

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Harry B. Wilson

Certificate of Service

I certify that one copy of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by placement in the United States Mail, postage paid, on July 21, 2002.

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